

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICK G. CESSNA)	
Claimant)	
VS.)	
)	Docket No. 1,050,359
STEVEN V. GRAHAM)	
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the June 23, 2010, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts.

ISSUES

This is a claim for an accident on June 1, 2009, when a table saw cut claimant's left hand. Although respondent initially denied responsibility for providing claimant with workers compensation benefits for that accident, respondent now accepts responsibility for the injuries to the left hand. But respondent denies responsibility for claimant's right upper extremity and cervical complaints, which claimant contends are the result of overcompensating for the left hand injury. In the June 23, 2010, Preliminary Decision, Judge Yates Roberts denied claimant's request for medical treatment of his right upper extremity and cervical spine on the basis that claimant had failed to satisfy his burden of proof.

Claimant contends the Judge erred and he maintains that his testimony and the opinion of Dr. James A. Stuckmeyer are uncontradicted that his right elbow, right shoulder, and cervical symptoms are due to overcompensating for the injured left hand, which was nearly severed. Consequently, claimant requests the Board to authorize medical treatment for his right elbow, right shoulder, and cervical spine and to allow claimant to select a physician of his choice since respondent has failed to provide treatment.

Respondent, on the other hand, argues the Preliminary Decision should be affirmed. First, respondent contends the Judge erred by admitting Dr. Stuckmeyer's June 17, 2010,

report into evidence as the report was not presented to respondent until the evening before the June 22, 2010, preliminary hearing. Accordingly, respondent asserts in its brief that K.S.A. 44-534a(a)(1) was violated.¹ Second, respondent seemingly argues that claimant would not have injured his right upper extremity by overcompensating for the left hand injury because he is right-hand dominant and, therefore, he would have been using his right hand following the accident regardless of the injury to the left hand. Respondent argues, in part:

Claimant attempts to dismiss the fact that the claimant is right handed. However, this is a critical consideration. The claimant injured his non-dominant hand. The claimant testified he had to do things with his right hand such as, "opening doors" (citation omitted). What also must be considered is the fact that even if the claimant's left hand had not been injured, because the claimant is right hand dominant, he would still open doors with his right hand.²

Respondent also seemingly argues that claimant did not injure his right upper extremity or cervical spine due to overcompensating for the left hand injury as following the accident claimant has only worked sparingly. In addition, respondent represents that following the accident claimant has generally performed only activities of daily living and if he has used his right upper extremity in excess it has been to feed and water his horses. Accordingly, respondent suggests those activities are the cause of claimant's symptoms. Respondent wrote, in part:

The claimant treated with Dr. Bene for his left hand from June 1, 2009 through August 14, 2009. At no point during that treatment did the claimant make any complaints of pain in his right elbow, right shoulder or cervical spine. Furthermore, in large part, the claimant has not performed any activities in excess of those arising out of the activities of daily living. Claimant states in his brief, "Claimant had a farm where he had horses and used his right arm to provide food, water and hay. In fact, almost every activity of daily living required excessive use of his right arm for a period of approximately one year from the date of accident." (Citation omitted.) If this is the case, then perhaps claimant's excessive activities performed outside of work are the cause of the claimant's current complaints in his cervical spine and right upper extremity, regardless of his work injury.³

¹ It is not clear from the record that respondent presented such argument to the Judge at the preliminary hearing. Further, the Board must assume respondent objects to the report as it was not attached to claimant's application for a preliminary hearing.

² Respondent's Brief at 4 (filed Aug. 12, 2010).

³ *Id.*, at 5, 6.

In short, respondent maintains claimant failed to prove his right upper extremity and cervical complaints are related to the June 1, 2009, accident. That is the only issue before the Board on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes that the Preliminary Decision should be modified as it is more probably true than not that claimant's right upper extremity and cervical complaints are from overcompensating for his left hand injury. Accordingly, claimant is entitled to receive medical treatment for those symptoms from respondent under the Workers Compensation Act.

The facts are relatively simple. On June 1, 2009, claimant was employed by respondent and installed laminate, hardwood, vinyl, and tile floors. On that date, claimant was installing a laminate floor when he nearly severed his left hand while cutting a piece of laminate with a table saw. For some unknown reason the saw kicked and the blade made a diagonal cut across claimant's left hand from his thumb past his little finger.

Claimant was immediately taken to a local hospital emergency room. Shortly afterwards Dr. Richard J. Bene operated on claimant's hand. Claimant continued to treat with Dr. Bene through August 14, 2009. Claimant testified he could no longer afford to consult with the doctor as he was denied workers compensation benefits.

Claimant's preliminary hearing was held on June 22, 2010. Between his accident and the preliminary hearing claimant worked minimally. In either November or December 2009 claimant repaired drywall, which took one day. Later, claimant did another repair job, which took two days. In addition, claimant helped a neighbor perform touch-up paint work at Kauffman Stadium, where claimant painted areas of rust with a can of spray paint. That job provided claimant with about 20 to 30 hours of work a week for about two and one-half weeks. Although he has looked, claimant has been unable to find other employment.

Claimant testified that he has no feeling in either his thumb or little finger and, therefore, is unable to grip with his left hand. Accordingly, since the accident claimant has primarily used his right upper extremity. Claimant presently has pain in his right elbow, right shoulder, and neck that he attributes to overuse from compensating for the left hand injury.

Claimant returned to Dr. Bene in mid-June 2010. The doctor suggested additional surgery on claimant's left hand. At the request of claimant's attorney, on June 10, 2010, claimant was examined by Dr. James A. Stuckmeyer. In addition to claimant's left hand injuries, Dr. Stuckmeyer diagnosed claimant as having mild epicondylitis in the right elbow,

mild impingement syndrome in the right shoulder, and cervical strain. The doctor suggested anti-inflammatory medications, physical therapy, and steroid injections to the elbow and shoulder. Moreover, Dr. Stuckmeyer related the elbow, shoulder, and neck problems to overcompensation. Dr. Stuckmeyer's opinion regarding the cause of claimant's present symptoms is the only expert medical opinion in the record at this juncture of the claim.

Respondent argues that Dr. Stuckmeyer's report was improperly admitted. The record indicates the medical report was not provided to respondent until the evening before the preliminary hearing. But it is not clear from the record if the Judge knew what specific objection respondent was making. The record provides in pertinent part:

Judge Yates: Okay. I've been handed what's been marked as Claimant's Exhibit 1, which is a photograph of the left hand, a statement of account from Monarch Plastic Surgery. I assume that is Dr. Bene.

Mr. Power: That's correct, Your Honor.

Judge Yates: And then also a report from Dr. Stuckmeyer.

Mr. Power: That is correct, Your Honor.

Judge Yates: Any objection to Claimant's 1?

Mr. Prichard: No objection, Your Honor.

Judge Yates: It will be admitted. Does the respondent have any exhibits they would like the court to consider?

Mr. Prichard: No, Your Honor; and I guess I don't have an objection, but for the record, I guess I did have an initial objection with Dr. Stuckmeyer's report.

Judge Yates: Sure. I understand that, that you just got it either this morning or late last night and you haven't really had a chance to -- it looks like it's a pretty lengthy report, plus his handwritten notes, I can never read. I can't read them today, either, but it's a five-page report. So if you need due time to look through that report prior to cross examination, I'll certainly give you the opportunity to do that.

Mr. Prichard: Okay.⁴

⁴ P.H. Trans. at 4, 5.

In its brief to the Board respondent clarifies that it was objecting to Dr. Stuckmeyer's medical report on the basis of K.S.A. 44-534a(a)(1).

If respondent gave the Judge more explanation off the record, we do not know. In any event, the Judge ruled the medical report was admitted. That is an evidentiary ruling that is not subject to review under K.S.A. 44-534a in an appeal from a preliminary hearing order.

The undersigned Board Member is persuaded by both claimant's testimony and Dr. Stuckmeyer's report. It is credible that claimant began using his right upper extremity to a much greater extent following the saw incident. Therefore, the opinion of claimant and Dr. Stuckmeyer that claimant overcompensated for the left hand injury is credible. Moreover, there is no other expert medical opinion to contradict Dr. Stuckmeyer. The undersigned rejects respondent's contention that claimant probably did not injure his right upper extremity as it was his dominant limb. Likewise, the undersigned rejects respondent's suggestion that claimant could not have injured his right upper extremity and neck from overcompensating for the left hand injury as he has only worked sparingly since the accident.

In summary, the undersigned finds claimant's right elbow, right shoulder, and cervical symptoms are directly related to claimant's June 2009 accident and, therefore, he is entitled to receive medical benefits for those symptoms. In that respect, the Preliminary Decision should be modified.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, the undersigned Board Member modifies the June 23, 2010, Preliminary Decision in that claimant's symptoms in his right elbow, right shoulder, and neck are related to his June 1, 2009, accident and, therefore, claimant is entitled to receive medical benefits from respondent to treat those symptoms under the Workers Compensation Act. Respondent is ordered to provide claimant with a list of three physicians from which claimant may select one to provide medical treatment.

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2009 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of September, 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Timothy E. Power, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge